IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JILL WATERS	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	NO. 03-CV-2909
	:	
GENESIS HEALTH VENTURES, INC.	:	

SURRICK, J. **JANUARY 10, 2005**

MEMORANDUM & ORDER

Presently before the Court is Plaintiff Jill Waters' Motion in Limine Seeking To Preclude Use Or Mention Of EEOC Determinations In Plaintiff's Case (Doc. No. 61) and Defendant Genesis Health Ventures, Inc.'s Response (Doc. No. 99). For the following reasons, Plaintiff's Motion will be granted.

I. Factual Background

Plaintiff, a Caucasian female, was employed by Defendant for ten years until her employment was terminated on September 23, 2002. (Doc. No. 6 at 2, 5.) Plaintiff alleges that in June, 2002, Defendant hired Marvin Kirkland ("Kirkland"), an African-American male, as director of nursing. (Doc. No. 27 ¶ 13.) Kirkland supervised Plaintiff and other employees. The factors motivating Plaintiff's termination are in dispute. Plaintiff alleges that her termination was due to Kirkland's discriminatory animus. (*Id.* ¶¶ 16, 30.) Specifically, Plaintiff alleges reverse discrimination based upon race in violation of 42 U.S.C. § 1981. (Doc. No. 66 at 2.)

On August 19, 2002, Plaintiff filed timely charges of age and disability discrimination

with the Philadelphia office of the Equal Employment Opportunity Commission ("EEOC") (No. 170A300082). (Doc. No. 61 Ex. A.) On January 27, the EEOC issued a notice that it was dismissing Plaintiff's age and disability discrimination charges, and a Right to Sue letter was issued on January 31, 2003. (*Id*.) On or about October 16, 2002, Plaintiff again filed charges of discrimination with the Philadelphia Office of the EEOC (No. 170A301058). (*Id*. Ex. B.) On April 24, 2003, the EEOC issued a notice that it was dismissing the charges, and a Right to Sue letter was issued on the same day. (*Id*.)

On May 2, 2003, Plaintiff filed a Complaint in this Court against Defendant alleging discrimination and retaliation on the basis of "age (59) and/or disability" in violation of the Age Discrimination in Employment Act ("ADEA"), Americans with Disabilities Act ("ADA") and the Pennsylvania Human Relations Act ("PHRA"). (Doc. No. 1 at 1.) The Complaint contained no claim of discrimination or retaliation based upon race.[1] In the Joint Case Report filed on or about August 29, 2003, Plaintiff reiterated that her Complaint was based on age and disability discrimination. (Doc. No. 6 at 1.) On March 8, 2004, almost a year after filing her Complaint, Plaintiff filed her First Amended Civil Action Complaint ("Amended Complaint"). (Doc. No. 18.) The Amended Complaint was the same as the original Complaint, but added a fifth count alleging reverse discrimination based upon race in violation of 42 U.S.C. § 1981. Thereafter, Plaintiff advised Defendant that she would not pursue the age discrimination claim in Count One.

On December 21, 2004, we granted summary judgment as to Plaintiff's ADA claim and Plaintiff's PHRA claim and denied summary judgment as to Plaintiff's claim under 42 U.S.C. §

[1]The original Complaint in the instant case contained four counts: (1) the claim under the ADEA; (2) the ADA claim; (3) the claim under 42 U.S.C. § 1981 alleging age discrimination; and (4) the claims under the PHRA. (Doc. No. 1.)

1981. Defendant claims Plaintiff was dismissed for performance-related reasons. Plaintiff responds that she had received positive reviews throughout her tenure until Defendant hired Kirkland in 2002. In 1998, Plaintiff was promoted to staff development coordinator. (Doc. No. 66 Ex. A at 29.) In 2001, Carol McQuillan, Defendant's administrator, offered Plaintiff another promotion. (*Id*. Ex. A. at 64, Ex. D at 144.)

Plaintiff files the instant Motion in Limine to exclude evidence at trial of the EEOC determinations on Plaintiff's age and disability discrimination charges.

II. Legal Standard

Federal Rule of Evidence 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Federal Rule of Evidence 402 provides that "all relevant evidence is admissible." Fed. R. Evid. 402. The Third Circuit has noted, "Rule 401 does not raise a high standard." *Hurley v. Atlantic City Police Dep't,* 174 F.3d 95, 109-10 (3d Cir. 1999) (quoting *In re Paoli R.R. Yard PCB Litig.,* 35 F.3d 717, 782-83 (3d Cir. 1994)). The Third Circuit has stated:

> [a]s noted in the Advisory Committee's Note to Rule 401, "relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Because the rule makes evidence relevant "if it has any tendency to prove a consequential fact, it follows that evidence is irrelevant only when it has no tendency to prove the fact."

Blancha v. Raymark Indus., 972 F.2d 507, 514 (3d Cir. 1992) (quoting Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5166, at 74 n.47 (1978)).

Under Federal Rule of Evidence 403, relevant evidence "may be excluded if its probative

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. The Third Circuit has stated that "[t]he weight of the case law holds that Rule 403 may operate on an EEOC report, and that the decision of whether or not an EEOC Letter of Determination is more probative than prejudicial is within the discretion of the trial court and to be determined on a case-by-case basis." *Coleman v. Home Depot, Inc*., 306 F.3d 1333, 1345 (3d Cir. 2002) (citations omitted); *see also Walton v. Eaton Corp*., 563 F.2d 66, 85 (3d Cir. 1977).

III. Discussion

Plaintiff argues that we should preclude use or mention of the EEOC determinations in this matter as they are of no relevance and would be unfairly prejudicial to Plaintiff. (Doc. No. 61 at 4.) Plaintiff asserts that the EEOC determinations have no probative value. (*Id*.) We agree. Federal Rule of Evidence 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Federal Rule of Evidence 402 provides that, "all relevant evidence is admissible." Fed. R. Evid. 402. The EEOC determinations are based on Plaintiff's allegations of age and disability discrimination. The trial in this case will proceed on Plaintiff's allegations of race discrimination and retaliation. The EEOC determinations are not relevant as they do not show any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence as required by Federal Rule of Evidence 401.

Defendant argues that "[b]ecause the EEOC's investigation was thorough and in accord with the evidence to be presented at trial, this evidence is highly probative." (Doc. No. 99 at 3.) However, the EEOC's investigation is not in accord with the evidence to be presented at trial precisely because, as mentioned above, the EEOC charges were based on Plaintiff's allegations of age and disability discrimination while the issues at trial will be based on race discrimination and retaliation.

The Third Circuit has adopted the principle that the admissibility decision regarding EEOC determinations is to be made by the trial court in the exercise of its discretion. *See Abrams v. Lightolier, Inc.*, 702 F. Supp. 509, 512 (D.N.J. 1989) (citing *Walton*, 563 F.2d at 75 (upholding trial court's refusal to admit portions of EEOC file in Title VII case); *Tulloss v. Near N. Montessori Sch., Inc.*, 776 F.2d 150, 144-54 (7th Cir. 1985) (same); *Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984) (upholding trial court's refusal to admit EEOC letter of determination in an action under Title VII and 42 U.S.C. § 1981)).[2] The Third Circuit also has stated that "[t]he weight of the case law holds that Rule 403 may operate on an EEOC

[2]There is a conflict in the Circuits over whether a preliminary EEOC determination, or a similar determination made by an equivalent state agency, is admissible evidence. Many courts have held that determinations such as these are admissible hearsay under the federal Business Records Act, 28 U.S.C. § 1732, or under the public records exception of the hearsay rule outlined in Federal Rule of Evidence 803(8)(C). *Dickerson v. State of New Jersey, Dept. of Human Servs.*, 767 F. Supp. 605, 611-12 (D.N.J. 1991) (citing *Plummer v. Western Int'l Hotels Co.*, 656 F.2d 502, 505 (9th Cir. 1981); *Bradshaw v. Zoological Soc'y of San Diego*, 569 F.2d 1066, 1069 (9th Cir. 1978); *Smith v. Universal Servs., Inc.*, 454 F.2d 154, 157-58 (5th Cir. 1972); *Strickland v. Am. Can Co.*, 575 F. Supp. 1111, 1112 (N.D. Ga. 1983)). Other courts have examined the issue under Federal Rule of Evidence 403 and have excluded such evidence as unduly prejudicial. *Id.* (citing *Ledford v. Rapid-American Corp.*, 47 Fair. Empl. Prac. Cas. (BNA) 312 (S.D.N.Y. 1988); *Coffin v. South Carolina Dep't of Social Servs.*, 562 F. Supp. 579, 591 (D.S.C. 1983)). The Third Circuit, however, holds that the admissibility decision is to be made by the trial court in the exercise of its discretion. *Id.* (citing *Walton*, 563 F.2d at 75).

report, and that the decision of whether or not an EEOC Letter of Determination is more probative than prejudicial is within the discretion of the trial court, and to be determined on a case-by-case basis." *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1345 (3d Cir. 2002) (citing *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 302 (11th Cir. 1989); *United States v. McDonald*, 688 F.2d 224, 229-30 (4th Cir. 1982); *Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 201-02 (5th Cir. 1992)). The *Coleman* court took the opportunity "to clarify that a District Court has the discretion to exclude probative EEOC Letters of Determination where the negative factors listed in Rule 403 substantially outweigh the probative value of EEOC determinations." *Id.*

In the instant case, the EEOC determinations have no probative value, but could be highly prejudicial. As discussed earlier, the trial of this case will focus on race discrimination not age or disability discrimination. Any evidence that the jury may hear concerning Defendants' treatment of Plaintiff that may involve her age or disability can certainly be properly weighed by the jury along with all of the other evidence without reference to the EEOC determination letters. The Third Circuit has indicated that, "other Rule 403 factors– especially considerations of undue delay, waste of time, or needless presentation of cumulative evidence, which are often necessary to counter an EEOC report– could 'kick-in' and control, especially where the report could be shown to be of low probative value." *Id.*

Defendant argues that the EEOC determinations are relevant to Plaintiff's retaliation claim. (Doc. No. 99 at 2.) We disagree. Plaintiff only need establish that she filed an EEOC claim of alleged discrimination and consequently suffered retaliation by Defendant. The actual determination is irrelevant. We are satisfied not only that the EEOC determinations have little

probative value, their introduction could cause undue delay, confusion, and could mislead the jury. Accordingly, we are compelled to bar the use of the EEOC determinations.

IV. Conclusion

For the foregoing reasons, Plaintiff's Motion in Limine is granted.

An appropriate Order follows.

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GENESIS HEALTH VENTURES, INC.	:	
	:	

ORDER

AND NOW, this 10th day of January, 2005, upon consideration of Plaintiff Jill Waters' Motion in Limine (Doc. No. 61, No. 03-CV-2909), and Defendant Genesis Health Ventures, Inc.'s Response (Doc. No. 99, 03-CV-2909), we ORDER that Plaintiff's Motion is GRANTED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick. J.